LIBRARY
SUPREME COURT, U. S.

FILED
SEP 6 1966
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, 1966.

No. 522

LINUS PAULING,
Petitioner,
vs.
GLOBE-DEMOCRAT PUBLISHING COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals for the Eighth Circuit.

JOHN RAEBURN GREEN,
LEWIS C. GREEN,
THOMAS C. COLEMAN,
314 North Broadway,
St. Louis, Missouri 63102,
Attorneys for Petitioner,
Linus Pauling.

GREEN, HENNINGS, HENRY & ARNOLD,
St. Louis, Missouri,
Of Counsel.

ST. LOUIS LAW PRINTING CO., INC., 415 N. Eighth Street. CEntral 1-4477.

INDEX.

	Page
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Constitutional and Statutory Provisions Involved	3
Statement of the Case	3
Reasons for Granting the Writ	12
Conclusion	22
Appendix A	1a
Appendix B	1b
Appendix C	1c
Appendix D	1d

Table of Cases Cited.

Associated Press v. Walker, 393 S. W. 2d 671, 680 (Tex. Civ. App. 1965), cert. applied for, No. 150, 1966 Term 12, 17

Butts v. Curtis Publishing Co., 242 F. Supp. 390, 394 (N. D. Ga., 1964), aff'd on other grounds, 351 F. 2d 702 (5th Cir. 1965), cert. applied for, No. 37, 1966 Term 12, 16

Clark v. Pearson, 248 F. Supp. 188, 195 (D. D. C. 1965) 13

Dempsey v. Time, Inc., 43 Misc. 2d 754, 252 N. Y. S. 2d 186, 189 (Sup. 1964), aff'd, 22 App. Div. 2d 854, 254 N. Y. S. 2d 80 (1964) 13

Faulk v. Aware, Inc., 14 N. Y. 2d 954, 202 N. E. 2d 372, 253 N. Y. S. 2d 990 (1964), cert. denied, 380 U. S. 916 13
Fignole v. Curtis Publishing Co., 247 F. Supp. 595, 597-598 (S. D. N. Y. 1965) 13

Garrison v. Louisiana, 379 U. S. 64, 67, 74, 75 (1964) .16, 19

Harper v. National Review, Inc., 33 U. S. L. W. 2341 (Sup. N. Y. 1964), aff'd, 263 N. Y. S. 2d 292 (App. Div., 1965) 13
Henry v. Collins, 380 U. S. 356, 357 (1965) 16

Lightfoot v. Jennings, 363 Mo. 878, 254 S. W. 2d 596 (1953) 15
Lorillard v. Field Enterprises, Inc., 65 Ill. App. 2d 65, 213 N. E. 2d 1, 7 (1965) 13

N. A. A. C. P. v. Button, 371 U. S. 415, 433 (1963) 17
New York Times Co. v. Sullivan, 376 U. S. 254 (1964) 2, 4, 10, 11, 12, 13, 14, 16, 18, 19, 20, 21, 22
Nusbaum v. Newark Morning Ledger Co., 86 N. J. Super. 132, 206 A. 2d 185, 199 (App. Div. 1965), cert. den., 44 N. J. 398, 209 A. 2d 138 (1965) 17

Pape v. Time, Inc., 354 F. 2d 558 (7th Cir. 1965), cert. den., 384 U. S. 909 (1966) 13
Pearson v. Fairbanks Publishing Co., 413 P. 2d 711, 714 (Alaska 1966) 17
Powell v. Monitor Publishing Co., 217 A. 2d 193, 196 (N. H., 1966) 12

Riss v. Anderson, 304 F. 2d 188, 194, 195 (8th Cir. 1962) 15
Rosenblatt v. Baer, 383 U. S. 75, 84 (1966) 16, 17

Time, Inc. v. Hill, reargument ordered, 384 U. S. 995 (1966) 13

Whitney v. California, 274 U. S. 357, 375 (1927).... 17

Youssoupoff v. Columbia Broadcasting System, Inc., 48 Misc. 2d 700, 265 N. Y. S. 2d 754, 756-59 (Sup. 1965) 13

Statutes and Other Authorities Cited.

United States Constitution:
First Amendment 3
Fifth Amendment 3
Seventh Amendment 3
Fourteenth Amendment 3
2 U. S. C., § 192 ..... 3, 15
28 U. S. C., § 1332 (a) (1) 2
28 U. S. C., § 1254 (1) 2
100 Cong. Rec. 14588-89 (1954) 15
1965 Ann. Survey of American Law 422-423 17
Pedrick, Freedom of the Press and the Law of Libel: The Modern Revised Translation, 49 Corn. L. Q. 581, 599-600 (1964) 15
38 So. Cal. L. R. 349, 354 (1965) 17
51 Va. L. Rev. 106, 119 (1965) 17

IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, 1966.

No. .....

LINUS PAULING,
Petitioner,
vs.
GLOBE-DEMOCRAT PUBLISHING COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals for the Eighth Circuit.

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above entitled case on June 21, 1966.

OPINION BELOW.

The opinion of the United States Court of Appeals for the Eighth Circuit (Appendix B) is reported at 362 F. 2d 188. The order of the United States District Court for the Eastern District of Missouri, entered on April

9, 1965, denied petitioner's motion to set aside the verdict and grant a new trial, without any accompanying opinion (R. 41-42).[1]

JURISDICTION.

The judgment of the Court of Appeals was entered on June 21, 1966 (Appendix C). The jurisdiction of the district court was based on diversity of citizenship and amount under 28 U. S. C., § 1332 (a) (1). The jurisdiction of this Court is invoked under 28 U. S. C., § 1254 (1).

QUESTIONS PRESENTED.

1. Whether the rule of *New York Times Co. v. Sullivan*, 376 U. S. 254 (1964) (that a public official may be libeled with impunity respecting his official conduct, in the absence of "actual malice"), is to be extended to petitioner, who is not a public official or public employee, but has publicly expressed his views on matters of public concern, where the libel relates to his involuntary appearance, under subpoena, before a subcommittee of the United States Senate.

2. If so, whether petitioner has already proved, or is entitled to an opportunity to prove, "actual malice" under the new rule, when the record already shows the following facts:

(a) The libelous editorial complained of falsely charged petitioner with a federal crime, contempt of Congress, and adjudication of guilt of that crime;

(b) When the publisher of respondent newspaper wrote that editorial, he knew that those charges were false, and so testified; and

---

[1] The printed record used by the court below was in two parts, respectively entitled "Record" and "Supplemental Record." Nine copies of each are filed with this petition, in which they are referred to respectively as "R." and "Supp. R." The typewritten transcript certified by the district court to the court of appeals is referred to as "Tr."

(c) Over a substantial period of time before and after that publication respondent newspaper published a series of editorials, a cartoon, and "letters to the editor" which (i) persistently and knowingly asserted false statements of fact, designed to discredit petitioner, and (ii) persistently abused petitioner with vitriolic epithets, "Communist" accusations, and a cartoon caricature labeled "COMMY."

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The constitutional and statutory provisions involved are the First, Fifth, Seventh, and Fourteenth Amendments to the United States Constitution, and Section 192 of Title 2 of the United States Code. They are set out in Appendix A.

STATEMENT OF THE CASE.

This is a diversity action for libel. Petitioner, Professor Linus Pauling, complains of three sentences in an editorial published by respondent in its newspaper[2] dated October 10, 1960 (R. 11).

Petitioner had won many awards for his scholarship in science, including the Nobel Prize in Chemistry in 1954 (R. 81, 84-87). He was awarded the Presidential Medal for Merit for his "exceptionally meritorious conduct" and his "brilliant success" in "research on military problems" in World War II (R. 81-83). He was especially commended by the United States Navy, the War Department, and the National Defense Research Committee for his services in World War II (Exhibits 15, 14 and 13, R. 86-87).

---

[2] Respondent publishes a newspaper, the St. Louis Globe-Democrat, with an average circulation of 342,207 (R. 79).

Because of the harm caused to people, and unborn children, by nuclear explosions (R. 88), in the years immediately preceding 1960, Professor Pauling devoted "perhaps a third of his time" to the problems of nuclear testing (R. 90). In 1957, he drafted a petition to the United Nations calling for an international agreement to stop the testing of nuclear bombs (R. 90; printed in full with names of signers, p. 78 of Exhibit C, but not received in evidence). With the help of others, he obtained the signatures of 11,021 scientists, from various countries throughout the world, to his petition (R. 58).

The United States Senate Judiciary Committee's Internal Security Subcommittee (hereinafter referred to as the Dodd Subcommittee) subpoenaed petitioner to appear on June 21, 1960 (App. p. 3b). Petitioner appeared on that date. He was questioned about the signatures on the petition, the names of those to whom petitioner had written requesting assistance in obtaining signatures, and the letters with which the signatures were transmitted to him (App. p. 3b). He agreed to produce the signatures and a list of the persons to whom he had written, but objected to a request that he produce the letters of transmittal (App. p. 3b). He was ordered to return on August 9 (later continued to October 11, 1960 (R. 127)), bringing the signatures and the letters (App. p. 4b).

In the meantime, petitioner instituted an action in the District Court for the District of Columbia for a declaratory judgment as to his rights and duties, respecting the order of the Dodd Subcommittee (Supp. R. 14). On August 23, 1960, the district court dismissed the petition, and the court of appeals affirmed on September 7, 1960, holding that the case presented no justiciable issue, because the time for compliance with the Subcommittee's order had not yet come (R. 91, 122; 288 F. 2d 126, 128-

29). Petitioner applied for certiorari (R. 91; No. 419, 1960 Term).[3]

That was the situation when the libelous editorial was published on October 9 and 10, 1960. Subsequently, on November 21, 1960, this Court denied certiorari (R. 91; 364 U. S. 900).

Meanwhile, on October 11, 1960, petitioner again appeared before the Dodd Subcommittee (R. 115-116; App. p. 5b). He produced for the Subcommittee three bound volumes containing the original signatures to his petition to the United Nations (R. 59, 60; App. p. 5b). He had already furnished a list of the persons whose assistance he had requested in soliciting signatures (App. p. 5b). The Subcommittee did not press him to produce the letters of transmittal, and at the end of the hearing he was excused from the subpoena (App. p. 5b).

I. The Libel.

The complaint (R. 11) sets forth as libelous three sentences from an editorial which appeared in respondent's newspapers dated October 10, 1960, as follows:

> "Pauling contemptuously refused to testify and was cited for contempt of Congress. He appealed to the United States District Court to rid him of the contempt citation, which that Court refused to do. The appeal from the lower court's affirmation of contempt is expected to be handed down by the Supreme Court today."

---

[3] To establish that petitioner was "projecting himself into the arena of public controversy" (App. p. 15b), and subject to the rule of *Times*, the court below relied also on evidence of various events *after* publication of the libel, such as "sign carrying and picketing on the issue near the White House and elsewhere" (App. p. 15b), institution of a lawsuit to enjoin further nuclear testing (App. p. 5b), receiving the Nobel Peace Prize in 1963 (App. p. 2b), and again appearing under subpoena before the United States Senate Judiciary Committee's Subcommittee on Internal Security (App. p. 5b). Such reliance was clearly erroneous, and the evidence of such events is therefore not set forth in the text.

The entire editorial was never offered in evidence, although it is appended to the opinion of the court below (App. pp. 23b-25b).

II. Evidence of Malice.

The evidence of malice was of three kinds: (1) evidence that the libelous charges were false, and respondent published them *knowing* that they were false; (2) evidence of other deliberately false statements of fact concerning petitioner, published by respondent; and (3) evidence of frequent publication by respondent of epithets and vilification directed at petitioner.

A. *Evidence of Respondent's Knowledge of Falsity.*

Respondent ultimately admitted that petitioner had not been "cited for contempt", had not appealed to a court "to rid him of a contempt citation", and that there was no "lower court's affirmation of contempt" (R. 45-46; 53-54; 132).

The libelous editorial was written by respondent's president (R. 46). He personally explained it: *"We felt he was about to be cited, he wasn't"* (R. 133).[4]

B. *Evidence of Other Deliberately False Statements of Fact.*

On October 24, 1960, two weeks after the libel, respondent printed a further statement, that petitioner had "refused to produce the actual signatures" to his petition (R. 53).

On November 23, 1960, respondent printed an editorial falsely charging petitioner with refusing to produce the

[4] Throughout this petition, emphasis has been added unless otherwise noted.

signatures (Ex. 9, R. 171-72, 61), reading in part as follows:

> ". . . Dr. Pauling allegedly collected some 11,000 signatures on a petition to discontinue nuclear testing. Unlike every valid petition known to society, *this petition contained not signatures*, but a typewritten list of names.
>
> "It obviously was impossible, from the list submitted, to tell whether these 'signers', actually did or did not sign the petition—in other words, whether the petition was in good faith or spurious.
>
> "The Senate's Internal Security Committee . . . requested that he submit . . . the signatures . . . which would make the petitions genuine and believable . . .
>
> ". . .
>
> "The principal issue is: was there substantial Communist participation in organizing the petitions? And *are the signatures genuine or aren't they?*
>
> "Dr. Pauling, a celebrated scientist, is using the behavioral tactics of a schoolboy who blows a spitball and ducks behind his desk before the teacher can identify him.
>
> ". . .
>
> "Perhaps . . . Dr. Pauling finally will have the decency to comply with accepted patterns and identify the signers . . ."

Professor Pauling had in fact on October 11, 1960, handed to the subcommittee the three bound volumes of original signatures to his petition (App. p. 5b). Respondent newspaper was well aware of that fact on October 24 and November 23, having previously published it in its news columns on October 12 and November 22 (Exhibits 8 and 7, R. 59, 60).

C. *Evidence of Frequent Publication of Epithets and Vilification.*

In addition to the above publications, respondent published editorials and a number of "letters to the editor" vilifying petitioner, accompanying one with a cartoon labeling petitioner "COMMY," and an editorial headline of the same kind. Excerpts from those publications introduced in evidence appear below:

> June 26, 1960: [Editorial] "Pauling . . . told the Senate Committee to go fly its kite . . . Defiant witnesses who refuse to testify must be cited for contempt and prosecuted, even if they are Nobel Prize winners . . ." (R. 48-49).

> October 16, 1960: [Letter] ". . . the *slithery* Linus Pauling who, also, under the guise of freedom of speech, apparently never intentionally *slithers* away from the current *Communist line*" (Exhibit 1, R. 50).

> March 23, 1961: [Letter] "Just a note in praise of your editorial on Linus Pauling. With responsible work backed by courage on the part of the press, there is some hope that enough Americans will not be fooled by the *Communists* before it is too late . . ." (Exhibit 2, R. 50).

> March 24, 1961:
>
> [Editorial headline above letter column]
>
> "Outcry in Defense of *Pauling 'Communist Trick.'*
>
> [Letter]
>
> "The Globe-Democrat is to be commended on defense of the original article on Pauling's refusal to give the names of the persons responsible for collecting names for the petition on United States unilateral nuclear disarmament.

> "Anyone aware of the rudiments of Communist propaganda is fully aware of the fact that the telephone calls the Globe received condemning the article was *a typical Communist trick.* There is no doubt that the majority of the calls received were from a small group of hardcore Communists or sympathizers" (Exhibit 5, R. 56).

That letter was accompanied by a cartoon caricature of Professor Pauling, with the label "COMMY" across his chest. A large portion of the letters column, with headline, letters and cartoon, is reproduced at Supp. R. 33. For the convenience of this Court, an enlarged copy of the cartoon, together with a photograph of petitioner printed by respondent in its news columns, are reproduced as Appendix D.

> April 11, 1961: [Letter] ". . . These misguided youngsters have joined with members of the WU faculty, who support *pro-Communist Dr. Linus Pauling*" (Exhibit 4, R. 53).

III. Proceedings Below.

Petitioner filed his complaint on September 27, 1961, setting out as libelous only the charges of October 10, 1960, that he had been "cited for contempt of Congress," that he had appealed to the federal court "to rid him of the contempt citation," and that his litigation had resulted in a "lower court's affirmation of contempt" (R. 11). He alleged actual malice, and sought compensatory and punitive damages (R. 12).

The original answer (R. 12) was stricken in substantial part, largely for failure to admit or deny the allegations of the complaint (R. 19). The amended answer (R. 20) admits the errors in the editorial sued on (R. 20-21), although pleading that the "gist and thrust" of the entire editorial was true (R. 24). The defenses of privilege and

fair comment were pleaded in the original answer (R. 16), but were omitted from the amended answer (R. 20-25).

Trial was set for November 4, 1963 (R. 6). On October 11, 1963, respondent filed a motion for continuance on the ground that petitioner had just been awarded the Nobel Peace Prize, and the attendant publicity would be prejudicial to respondent (R. 7). Petitioner objected, but the motion was granted, and the case was reset for March 16, 1964, when the trial commenced (R. 7).

Thus, the case came on for trial on March 16, 1964, seven days after the decision of this Court in *New York Times*. That morning, before commencement of the trial, respondent sought leave to amend its amended answer, to plead that petitioner voluntarily sought public expression of his views on national policy and invited comment thereon, and therefore came within the rule of *Times*[5]; the trial judge denied leave to amend on the ground that *Times* was not applicable (R. 6a, correcting docket entry of March 16 at R. 7). At the close of all the evidence, respondent again sought leave to amend its answer to raise that defense, and offered an instruction intended to present that defense (R. 135-136).[6] The court refused the instruction, and at first denied the amendment, on the same ground, but then permitted the amendment solely "for the purpose of preserving his point on appeal" (R. 136).

Thus, the case was tried, and submitted to the jury, as a case not controlled by *Times*. At the trial, much evi-

---

[5] This does not appear in the record designated by the parties for appeal. By failing to designate it, respondent has arguably waived the point. However, in the event that this Court may not want to dispose of the case on the ground that the defense was not raised in good time, these facts are set out here.

[6] The proffered instruction was designated "B," and appears at Tr. 312. It was not printed for the court below, but is printed at p. 19, n. 14, *infra*.

dence was admitted over petitioner's objection, including a purported report of a highly inflammatory and prejudicial denunciation of petitioner by Senator Dodd, who did not testify, was not sworn, and was not available for cross-examination (R. 118-22). That diatribe formed the basis of respondent's closing argument (R. 158-61).

The court refused to instruct the jury that the libel was libel per se, and (over petitioner's objection) instructed that the libel was ambiguous (R. 163-64). The instructions as to the supposed "first meaning" of the libel (to which petitioner objected) did not tell the jury how to reach a verdict (R. 163-65).

The jury returned a verdict for defendant, and judgment was entered accordingly (R. 170, 31, 32). A motion for new trial, specifying 75 errors, was overruled without opinion (R. 41).

Petitioner's briefs on appeal argued many issues, including the erroneous admission of the Dodd diatribe, and the erroneous instructions. The court of appeals found it "unnecessary . . . to consider" those issues (App. p. 23b), affirming on the ground that the *Times* rule should be "extended beyond governmental officials" (App. p. 15b), and, so extended, controls this case. The court refused to remand for a trial on the issue of "actual malice" under *Times,* holding that, as a matter of law, the evidence "add[s] up to something far less than the definition of actual malice prescribed for the *New York Times* exception" (App. p. 21b) (italics in original).

On motion, the mandate of the court of appeals has been stayed until after filing of this petition (pp. 27 and 28 of record certified by clerk of court of appeals).

REASONS FOR GRANTING THE WRIT.

I. The Decision Below Conflicts With the Applicable Decisions of Various Other Courts.

1. The court below is the only United States Court of Appeals which has extended *New York Times* beyond public officials. In thus extending the law, the decision below directly conflicts with numerous other decisions which have declined to do so, two of which are now pending in this Court on petition for certiorari.

In *Associated Press v. Walker,* 393 S. W. 2d 671, 680 (Tex. Civ. App. 1965), *cert. applied for,* No. 150, 1966 Term, the plaintiff was the widely known retired General Walker, who "thrust himself into the vortex" of a racial controversy in Mississippi. The alleged libel in that case concerned the voluntary activities of General Walker in that controversy. Nevertheless, the Texas court held that the *Times* rule did not preclude his action for damages for the alleged libel, even in the absence of malice.

In *Butts v. Curtis Publishing Co.,* 242 F. Supp. 390, 394 (N. D. Ga., 1964), *aff'd on other grounds,* 351 F. 2d 702 (5th Cir. 1965), *cert. applied for,* No. 37, 1966 Term, the plaintiff was a football coach and director of athletics at the University of Georgia. The alleged libels concerned his activities as a football coach. The court held that he was not a "public official" within the meaning of *Times,* and therefore refused to apply that rule to him.

In *Powell v. Monitor Publishing Co.,* 217 A. 2d 193, 196 (N. H., 1966), plaintiff was a former governor of New Hampshire, who alleged in his complaint that he was known throughout the United States, had served as Chairman of the United States Governors' Conference, and in other administrative capacities in the United States, and had resumed the general practice of law. It was further

indicated that the plaintiff was still active in political affairs (217 A. 2d at 194). The Supreme Court of New Hampshire refused to extend *Times* to former Governor Powell.

Other cases in conflict with the decision below include: *Clark v. Pearson*, 248 F. Supp. 188, 195 (D. D. C. 1965); *Fignole v. Curtis Publishing Co.*, 247 F. Supp. 595, 597-598 (S. D. N. Y. 1965) (foreign political figure); *Youssoupoff v. Columbia Broadcasting System, Inc.*, 48 Misc. 2d 700, 265 N. Y. S. 2d 754, 756-59 (Sup. 1965) (foreign political figure).[7] See also *Harper v. National Review, Inc.*, 33 U. S. L. W. 2341 (Sup. N. Y. 1964), *aff'd*, 263 N. Y. S. 2d 292 (App. Div., 1965) (world famous educator who had injected himself into public debate on the war in Viet Nam).[8] *Cf. Time, Inc. v. Hill*, reargument ordered, 384 U. S. 995 (1966).

2. In ruling that the evidence adduced below was insufficient to make a submissible case of "actual malice" under *Times*, the decision of the court below conflicts with most of the decisions cited in its opinion as considering the *Times* rule, which explicitly recognized that "actual malice" is shown by evidence that the libelous statement was made with knowledge that it was false, or with reckless disregard of whether it was false or not. For example, the decision conflicts with *Pape v. Time, Inc.*, 354 F. 2d 558 (7th Cir. 1965), *cert. den.*, 384 U. S. 909 (1966),

---

[7] Notwithstanding the opinion below, it would seem that foreign political matters are matters of public concern in the United States in this age.

[8] Other courts have refused to extend the *Times* rule to persons who deliberately seek public attention and comment for financial gain, such as radio or television performers (*Faulk v. Aware, Inc.*, 14 N. Y. 2d 954, 202 N. E. 2d 372, 253 N. Y. S. 2d 990 (1964), *cert. denied*, 380 U. S. 916) and sports figures (*Dempsey v. Time, Inc.*, 43 Misc. 2d 754, 252 N. Y. S. 2d 186, 189 (Sup. 1964), *aff'd*, 22 App. Div. 2d 854, 254 N. Y. S. 2d 80 (1964)). See also *Lorillard v. Field Enterprises, Inc.*, 65 Ill. App. 2d 65, 213 N. E. 2d 1, 7 (1965) (socialite).

in which the *Times* rule was applied to a police lieutenant who had been deputy chief of detectives for Chicago. There the alleged libel was that a Report of the United States Civil Rights Commission stated that Pape had committed certain acts, whereas the Report had only said that another person had alleged that Pape had committed those acts. Pape could show no evidence of malice, except "Time's" departure from the wording of the Report. The court reversed a summary judgment for defendant, holding that this fact alone was sufficient to permit a jury to find that "Time" had acted with reckless disregard of the truth.

The case at bar contains much stronger evidence than that. The record conclusively shows that respondent knew, when the libelous charges were printed, that they were false. The libelous editorial complained of was written by respondent's president and publisher (R. 46), who admitted "*we felt he was about to be cited, he wasn't*" (R. 133).

Moreover, there is ample evidence of reckless disregard of the truth. The libelous charges complained of were fabricated by respondent, without any basis in fact. At the time the libelous editorial was published, petitioner could not have committed contempt of Congress, because the time to respond to the order of the Dodd Subcommittee had not yet come (R. 91, 122, 127; 288 F. 2d 126, 128-29). In fact, as respondent was compelled to admit, petitioner was never cited for contempt (R. 45-46, 53-54, 132).[9]

---

[9] The bald statement of the court below that this libelous editorial "was generally true" (App. p. 6b) is appalling. Aside from the fact that the entire editorial was never offered in evidence, it should not be difficult to perceive a substantial difference between (1) the truth—that petitioner testified, and was ultimately released from his subpoena, and (2) the false charge—that he refused to testify, was cited for contempt, and adjudicated guilty of that crime by a United States District Court. Refusing to testify, in

Reckless disregard of the truth is also shown by respondent's repeated charges that petitioner had refused to produce for the Dodd Subcommittee the signatures of persons who had signed the nuclear-testing petition. The newspaper repeatedly maligned petitioner for refusing to produce them (*e. g.*, October 24 and November 23, 1960), whereas in fact, as respondent had printed in its own columns (*e. g.*, October 12 and November 22), petitioner had produced the signatures (see pp. 6-7, *supra*).[10]

In addition, the record shows a continuing, calculated campaign of character assassination by respondent newspaper, directed specifically at petitioner, both before and after the libelous editorial. Together with the continuing misstatements of facts, the malicious, abusive epithets and cartoon ("slithery," "Communist," "Communist trick," "COMMY," "pro-Communist")[11] are added evidence of actual malice (see pp. 8-9, *supra*).

---

violation of a subcommittee order, is a crime punishable by imprisonment. 2 U. S. C., § 192. Respondent's libel was therefore libel *per se* under Missouri law. *E. g., Riss v. Anderson,* 304 F. 2d 188, 194, 195 (8th Cir. 1962). "When we have once cited a man for contempt of the Senate, that is not a slight reflection on him; that is enough to ruin a man's life." Senator Lehman, 100 Cong. Rec. 14588-89 (1954).

[10] "As to material originated by the press itself, however, the position should be quite different. What the press publishes by way of its own news story or by way of editorial should be subjected to the standard of responsibility appropriate to any originator. *One who publishes on his own authority a statement as fact without a reasonable grounds for knowing whether it is true or false* is surely chargeable with a reckless indifference as to whether it is true. The first amendment is concerned with protecting the free flow of information—not slipshod reportorial work. *If a paper publishes as fact on its own authority a proposition disprovable by information in its own files we will not await the further development of electronic memory aids to charge the publisher with a reckless disregard of the truth.*" Pedrick, *Freedom of the Press and the Law of Libel: The Modern Revised Translation,* 49 Corn. L. Q. 581, 599-600 (1964).

[11] It may be noted that such terms themselves are libel *per se*. *E. g., Lightfoot v. Jennings,* 363 Mo. 878, 254 S. W. 2d 596 (1953).

Thus the record below presented a far stronger case of actual malice than was presented in the *Pape* case, and a far stronger case than required by the language of *Times.* In ruling as a matter of law that this evidence cannot show "actual malice," the decision below clearly conflicts with the cases cited.

II. The Decision Below Conflicts With the Applicable Decisions of This Court.

As pointed out in the immediately preceding paragraphs, the record shows that, when the libel complained of was published, respondent knew that it was false, and in any event acted with reckless disregard of whether it was false or not. That evidence, as a matter of law, established "actual malice" as defined in *Times,* 376 U. S. at 279-280. That definition is reaffirmed in *Garrison v. Louisiana,* 379 U. S. 64, 67, 74, 75 (1964).

The same ruling was reaffirmed in *Rosenblatt v. Baer,* 383 U. S. 75, 84 (1966).

In the words of *Henry v. Collins,* 380 U. S. 356, 357 (1965), the evidence conclusively shows "intent to inflict harm through falsehood."

In holding that, as a matter of law, the evidence already adduced cannot make a submissible case of "actual malice", the decision below conflicts with all the foregoing decisions of this Court.

III. The Court Below Has Decided Important Questions of Federal Law Which Have Not Been, But Should Be, Settled by This Court.

1. In becoming the only court of appeals to extend *Times* to a person who is not a public official, the court below has decided the question expressly reserved by this Court in *Rosenblatt v. Baer,* 383 U. S. 75, 86, n. 12 (1966). The importance of this question to the state and federal judiciary is demonstrated not only by the *Butts* (No. 37)

and *Walker* (No. 150) petitions for certiorari, but also by the many cases in the lower courts involving the same question, some of which are cited in the opinion below. In some the courts have managed to avoid deciding the question, but all of the courts have been troubled by it.[12] The orderly administration of justice demands that this Court now resolve the question.

More than that, however, the decision below is important because of the repressive effect it will have upon free speech. As Mr. Justice Brandeis stated in *Whitney v. California,* 274 U. S. 357, 375 (1927): "Those who won our independence believed . . . public discussion is a political duty; and that this should be a fundamental principal of the American government." As affirmed in *Rosenblatt v. Baer,* 383 U. S. at 85, "criticism of government . . . must be free . . ."

Would not extension of *Times* to this case in effect limit the freedom of speech of citizens of high attainment, on matters of public concern, by exposing them to be libeled without redress (unless actual malice can be proved)? As one commentator has observed, "granting of a further privilege to those who misstate the facts in defaming outspoken private citizens will only restrain that free debate which is desired." 51 Va. L. Rev. 106, 119 (1965).[13]

In *N. A. A. C. P. v. Button,* 371 U. S. 415, 433 (1963), this Court said: "First amendment freedoms need breathing space to survive," they "are delicate and vulnerable, as well as supremely precious," and "the threat of sanc-

---

[12] *E. g., Nusbaum v. Newark Morning Ledger Co.,* 86 N. J. Super. 132, 206 A. 2d 185, 199 (App. Div. 1965), *cert. den.,* 44 N. J. 398, 209 A. 2d 138 (1965); *Pearson v. Fairbanks Publishing Co.,* 413 P. 2d 711, 714 (Alaska 1966). The importance of the question is emphasized by the numerous secondary comments on *Times* and its progeny, a sampling of which is collected in the footnote at p. 31 of the Associated Press petition for certiorari in No. 150.

[13] See also 38 So. Cal. L. R. 349, 354 (1965); 1965 Ann. Survey of American Law 422-423.

tions may deter their exercise." If an eminent scientist cannot inform the public of the dangers of nuclear testing, without being exposed to false charges of criminal conviction, without redress, is not the breathing space of his freedom of speech sharply limited on the topic on which he is best qualified to speak? Is not this the threat of a non-governmental sanction which may well deter his exercise of freedom of speech?

As this Court said of another threat to free speech, "under such a rule, would-be critics of official conduct may be deterred from voicing their criticism . . . The rule thus dampens the vigor and limits the variety of public debate. It is inconsistent with the First and Fourteenth Amendments." *Times,* 376 U. S. at 279.

In effect, the decision below would expand freedom to libel at the expense of freedom of speech. Before such a prohibitive penalty is placed upon one who performs what Mr. Justice Brandeis terms his "political duty," this Court should consider the full implications of the proposed extension.

2. In denying a new trial on "actual malice," the ruling below immunizes a knowingly false charge of federal crime, as part of a continuing campaign of character assassination (see pp. 6-9, *supra*). It is squarely in conflict with this Court's previous ruling:

> ". . . the use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected. Calculated falsehood falls into that class of utterances which 'are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality . . .' . . . Hence the knowingly false statement and the false statement made with reckless disregard of

the truth, do not enjoy constitutional protection." *Garrison v. Louisiana,* 379 U. S. at 75.

If this tenet is to be discarded, and the use of the deliberate, knowingly false accusation of conviction of crime, as a part of a vicious campaign of character assassination, is to be enshrouded with the protection of the First Amendment, the decision to do so should be made by this Court, not by an inferior court.

IV. The Court Below Has so Far Departed From the Accepted and Usual Course of Judicial Proceedings as to Call for the Exercise of This Court's Power of Supervision.

The court below, if it had followed the accepted course of judicial proceedings, might have rejected respondent's *Times* defense on either of two procedural grounds. First, the record certified on appeal did not show that the defense had been raised in good time, although in fact, it had been (see p. 10, n. 5, *supra*). Second, the instruction later offered by respondent in support of that defense incorrectly defined "actual malice," and thereby failed to preserve the defense on appeal.[14]

Although the *Times* defense had not been properly preserved, the court below nevertheless entertained respondent's *Times* argument, extended *Times* far beyond its original scope, and affirmed the judgment for respondent. In doing so, the court not only ruled that the evidence already in the record could not, as a matter of law, constitute "actual malice," within the meaning of *Times,*

[14] That instruction B was not printed for the court below. It read: "The Court instructs the jury that if plaintiff voluntarily sought public discussion of his views on national policy and of his conduct before the U. S. Subcommittee on Internal Security Laws and invited public comment thereon, then unless you find that the defendant was actuated by actual malice (in the sense of ill will or spite) your verdict should be for the defendant" (Tr. 312). It was plainly incorrect, for it did not provide for a finding of actual malice if respondent knew that the libel was false, or acted in reckless disregard of whether it was false or not. *Times,* 376 U. S. at 279-80.

but also ruled that petitioner was not entitled to a new trial, and an opportunity to prove "actual malice," under its newly extended *Times* rule. That ruling so far departs from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

1. One ground stated by the court below for refusing to permit a new trial on this issue was: "the exception [of 'actual malice'] to the [*Times*] rule was there for the plaintiff to see and to meet if he could, was apparent and known by counsel, and, by the jury's verdict, was not met" (App. p. 22b). By this statement the court below apparently meant that petitioner should have anticipated its novel extension of the *Times* decision,[15] and, even though the trial judge had ruled *Times* inapplicable (see p. 10, *supra*), should have nevertheless offered evidence and instructions to meet the *Times* definition of "actual malice." Such a ruling is a startling departure from the accepted course of judicial proceedings.

If the trial judge had ruled that "actual malice" as defined by *Times* must be proved, petitioner's counsel would no doubt have chosen different publications of respondent, and presented different evidence,[16] to meet that burden. No plaintiff can be held, at his peril, to a rule that he must anticipate a novel extension of the

---

[15] The trial had been continued on defendant's motion and over plaintiff's objection, from a setting of November 4, 1963, on the ground that plaintiff had just been awarded the Nobel Peace prize (R. 7). The cases cited by the court below were, of course, decided long after the trial.

[16] Most of the letters to the editor offered by petitioner at the trial were found by research of petitioner's counsel (*e. g.*, R. 49, 51, 52, 54, 55). They were not identified or produced by respondent, which denied, under oath, having received any such letters (R. 54-55). Petitioner cannot know how many more such letters would be identified, if respondent would make truthful answers to interrogatories on remand for a new trial.

law, and must direct his evidence and instructions[17] to meet an extension which no court had yet made, and which the trial judge had already rejected. The decision below deprives petitioner of due process of law, and of his right to a jury trial, and calls for the exercise of this Court's power of supervision.

2. The court below held, alternatively, that the jury had ruled against petitioner on the issue of malice (as defined by the trial judge), and there was therefore no point in submitting the issue of "actual malice" (on the new definition of *Times*) to the jury in a new trial. See App. pp. 21b-22b. Yet this reliance upon the jury verdict was clearly erroneous, for the jury verdict was defective on many other grounds, all of which the court below refused to consider (App. p. 23b).

On appeal, petitioner urged error in admission of the inflammatory denunciation by Senator Dodd (whose public reputation was then unblemished), and in the inflammatory closing argument of respondent's counsel based thereon (R. 160). This was most effective with the jury, and it was error. The court below declined to consider this. Petitioner also urged error in the instructions which failed to give the jury the guidance needed, and other substantial errors (see p. 11, *supra*). In fact, one-half of the key instruction led the jury to a dead end. In the court below petitioner filed two briefs spelling out the errors,[18] and their highly prejudicial nature in detail, only five pages of which were directed toward the *Times* rule. The verdict was invalid, for the reasons stated in those briefs.

---

[17] It may be noted that petitioner's Instruction E, directing the jury's attention to respondent's other publications as evidence of actual malice, was refused (R. 156).

[18] Petitioner reserves the right to argue these errors, if respondent relies on the ruling below that the jury verdict precludes a new trial. For the convenience of the Court, should it desire to explore these errors, petitioner is depositing with the Clerk of this Court nine copies of the opening, responding, and reply briefs below.

The court below held that it was "unnecessary for us to consider" any of those errors, because the case should be disposed of on the basis of *Times* (App. p. 23b). In short, the court held that, even if petitioner's points were well taken, and the jury verdict was thereby rendered invalid, petitioner could not recover, because "the jury returned a verdict in favor of the defendant" (App. p. 21b).

When an appellate court declines to consider the propriety of the evidence and instructions on which a verdict is based, ought it then to use the same verdict to preclude a new trial? This is what the court below did.

It is submitted that the action of the court below constitutes such a departure from the accepted and usual course of judicial proceedings, and such a denial of due process of law and the right to jury trial, as to call for an exercise of this Court's power of supervision.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN RAEBURN GREEN,

LEWIS C. GREEN,

THOMAS C. COLEMAN,
Attorneys for Petitioner.

GREEN, HENNINGS, HENRY & ARNOLD,
314 North Broadway,
St. Louis, Missouri 63102,
Of Counsel.

September 1, 1966.

APPENDIX A.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

United States Constitution.

AMENDMENT I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

AMENDMENT V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VII.

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

Appendix A
Constitutional and Statutory Provisions Involved

AMENDMENT XIV.

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2 U. S. C., Section 192.

Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months.

* * * * * * *

APPENDIX B.

OPINION BELOW.

UNITED STATES COURT OF APPEALS
For the Eighth Circuit

No. 18,082

Linus Pauling,

Appellant,

v.

Globe-Democrat Publishing Company, a Corporation,

Appellee.

Appeal from the United States District Court for the Eastern District of Missouri.

[June 21, 1966.]

Before VOGEL, Chief Judge, and BLACKMUN and GIBSON, Circuit Judges.

BLACKMUN, Circuit Judge.

A jury returned a verdict for the defendant in this diversity civil libel action instituted in September 1961 by Linus Pauling against the corporation which publishes the newspaper known as the St. Louis Globe-Democrat. The plaintiff appeals.

Appendix B
Opinion Below

Pauling, for many years a professor of Chemistry at the California Institute of Technology, is a man of international repute. His status as a scholar and as a scientist is not questioned. His awards include many honorary degrees, recognition by the United States government for meritorious service during World War II, the 1954 Nobel Prize in Chemistry, and, more recently, the Nobel Peace Prize.

The alleged libel grew out of a controversy over Pauling's efforts to promote a nuclear test ban treaty. The libel is claimed to exist in the following three sentences of the defendant newspaper's editorial, entitled "Glorification of Deceit", published in its issues of October 10, 1960, in respect to an appearance by Pauling before a subcommittee of the United States Senate's Committee on the Judiciary:

> "Pauling contemptuously refused to testify and was cited for contempt of Congress. He appealed to the United States District Court to rid him of the contempt citation, wihch that Court refused to do. The appeal from the lower court's affirmation of contempt is expected to be handed down by the Supreme Court today."

The defendant's editorial in its entirety is attached as an appendix to this opinion.

A review of some of the factual background culminating in the challenged editorial may be enlightening:

Prior to 1960 Professor Pauling evinced concern about nuclear testing. In January 1958, he submitted to the United Nations a petition "urging that an international agreement to stop the testing of nuclear bombs be made now". This was prepared and signed by Pauling and had appended to it a list of the names of 9,234 other scientists

from throughout the world. An additional list of 1,803 was submitted by him in July. The two lists, with Pauling, made a total of 11,038 names. The original signatures were retained by Pauling and did not accompany the petition.

Also, about this time, the professor and other United States citizens and some non-resident aliens sought, in the United States District Court for the District of Columbia, to enjoin the Secretary of Defense and the Atomic Energy Commission from detonating nuclear weapons. Judge Keech dismissed the complaints on the grounds that they failed to state a justiciable controversy and that none of the plaintiffs had standing to sue. *Pauling* v. *McElroy*, 164 F.Supp. 390 (D.D.C. 1958). The Court of Appeals affirmed, 278 F.2d 252 (D.C. Cir. 1960). The Supreme Court denied certiorari, 364 U.S. 835.

Dr. Pauling's efforts in this direction came to be a matter of interest to the Judiciary Committee's Subcommittee on Internal Security. Hearings on his activity were held on June 21 and October 11, 1960. Pauling was subpoenaed and testified on both occasions.[1]

At the June 21 hearing the subcommittee manifested a desire to obtain three things from Dr. Pauling: The signatures to the petition; the names of the persons to whom Pauling had written requesting assistance in obtaining signatures; and the letters with which the signatures were transmitted to Pauling. Although he agreed to produce the signatures and a list of the persons to whom he had written for assistance in their collection, he refused a request to supply a list of persons who had transmitted

[1] Reports of these hearings were made and printed for the use of the Committee on the Judiciary. The Report of the June 21, 1960, hearing contains, at pp. 79-355, the 11,038 names on the two lists.

signatures to him. His refusal was essentially on the grounds that this would expose the participants to reprisals and would violate a trust they had reposed in him. At the conclusion of the hearing on June 21 the subcommittee ordered Dr. Pauling to appear on August 9 and to bring with him all signatures to the petition presented to the United Nations and all letters of transmittal with which those signatures came to him. The hearing so scheduled for August 9 was thereafter postponed to October 11.

In the meantime, Pauling instituted an action in the United States District Court for the District of Columbia against Senators Eastland and Dodd (the subcommittee's chairman and vice-chairman, respectively), the United States Attorney for the District of Columbia, and the Sergeant-at-Arms of the Senate. In his complaint Pauling alleged that the subcommittee's order of June 21 was violative of his rights under the First and Fourth Amendments and called for the production of papers not pertinent to any lawful inquiry; he expressed willingness, however, to produce the signatures of United States residents who had signed the petition. Pauling requested a declaratory judgment as to his rights and duties with respect to the subcommittee's order and as to its validity. He also sought injunctive relief against enforcement of the order and against his being prosecuted for any failure to comply with it. Judge McGarraghy, on August 23, 1960, granted the defense motion to dismiss. He did so on the grounds that the challenged order was not subject to judicial review in that action; that the plaintiff had an adequate remedy at law in the event of proceedings against him; and that the relief sought would require an unauthorized interference with the legislative branch. Again the Court of Appeals affirmed, *Pauling* v. *Eastland*,

288 F.2d 126 (D.C. Cir. 1960), and the Supreme Court denied certiorari, 364 U.S. 900.

While that appeal was pending Pauling advised the Court of Appeals by letter that he was ready to submit the original signatures to the subcommittee. During the pendency of the petition for certiorari a request was made that the subcommittee postpone further hearing until the Supreme Court acted. This request was denied and the second hearing took place on October 11. At that time Dr. Pauling produced the signatures. A week earlier he had sent the subcommittee a list of the persons, about 1200 in number, whose assistance he had requested. He continued to refuse, however, to comply with that part of the order which called for the production of the transmittal letters. He renewed his contention that to do so would subject the participants to reprisals. At the end of the hearing Dr. Pauling was excused from the subpoena.

At this point we note, parenthetically, that Pauling, together with over 100 United States nationals and more than 100 aliens, subsequently instituted still another suit in the United States District Court for the District of Columbia to restrain the Secretary of Defense and the Atomic Energy Commission from detonating any nuclear weapon. This time Judge McLaughlin granted the defense motion to dismiss. He did so on the grounds that the plaintiffs had no standing to sue; that the complaint failed to state a justiciable controversy; that the actions and powers challenged were plainly authorized by law and the Constitution; and that the matter was res judicata by the earlier holding in *Pauling v. McElroy*, supra. The Court of Appeals, in a vigorous opinion, affirmed and said that the district court "was plainly correct on all

points". *Pauling* v. *McNamara*, 331 F.2d 796, 798 (D.C. Cir. 1963). Certiorari was denied, 377 U.S. 933.

We now return to the present case. The plaintiff by his complaint asserts that the statements in the editorial's three sentences quoted above were false in that Pauling was not cited for contempt of Congress, in that he did not appeal to any court to rid himself of any contempt citation, and in that no appeal from a court's affirmation of contempt was expected because there had been no such affirmation. Pauling also alleges that the defendant published the quoted statements when it knew or should have known that they were false. He seeks both compensatory and punitive damages.

The defendant newspaper, by its amended answer, admits that Pauling had not been cited for contempt of Congress and had not appealed to any court to rid himself of a contempt citation, and that the editorial's contrary statements "are literally false", but it denies that in "the context in which they appeared they were false in substance and effect." The defendant further alleges "that the gist and thrust" of the publication was that Pauling "was contemptuous of the authority of the Congress of the United States" in that he had contemptuously refused to testify as to the identity of the persons who had helped him collect the petition; that he had unsuccessfully invoked federal judicial power to prevent his being punished for his contemptuous actions; that "the gist and thrust of the publication was and is true"; and [as amended at the trial] that Pauling "voluntarily sought public expression of his views on national policy and invited public comment thereon".

Pauling's motions for summary judgment and for a directed verdict on the issue of liability were denied. As

above noted, the case was submitted to the jury and the jury brought in a general verdict for the defendant.

On this appeal Pauling renews his argument that the defendant is liable as a matter of law and that the trial court should have instructed the jury to that effect and allowed it to pass only on the issue of damages. Pauling also urges error in the instructions, in the admission of evidence, and in other aspects of the conduct of the trial.

The defendant in response argues that the trial court's refusal to grant the plaintiff a summary judgment or directed verdict on the issue of liability was proper because this was prohibited under the terms of the Missouri Constitution, Article I, § 8, and by the First Amendment; there was a genuine issue of substantial truth; the subject of the challenged publication was a matter of grave national interest; and the essential ingredient of defendant's liability, namely, actual malice, was not alleged and was insufficiently proved. It also argues that there was no reversible error in the instructions, in the admission of evidence, or in the trial's conduct. It finally urges a failure to plead and prove a claim for relief for libel under constitutional standards recently enunciated by the Supreme Court.

We go directly to this last argument of the defense. The trial in the district court took place March 16-19, 1964. Seven days before the trial began the Supreme Court decided *New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964). It is obvious from the record that it was because of the promulgation of the opinions in *New York Times* that the defendant further amended its answer, by leave during the trial, to add the allegation, above noted, that Pauling "voluntarily sought public expression of his views on national policy and invited public comment

thereon''; indeed, the *New York Times* decision was specifically pleaded. The district court refused to instruct the jury on the *New York Times* issue but allowed the amendment in order to preserve the point for appeal.

New York Times reaches the question whether the freedom of speech and of the press guarantees of the First and Fourteenth Amendments limit state power to award damages to a ''public official'' for defamatory falsehood relating to his official conduct. The answer is that the amendments do limit such state power unless the plaintiff ''proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not''. Pp. 279-80 of 376 U.S.

The advertisement which was the subject of that litigation is really not dissimilar to the editorial with which we are now concerned. Both bore upon controversial public issues. Each was generally true; each was partially false. The Alabama courts had held that the statements in the advertisement were ''libelous per se'' against a Montgomery city commissioner charged with the supervision of the police department, and the Alabama jury was so instructed. The Supreme Court held, pp. 269-88 of 376 U.S., that libel, as such, is not immune from constitutional limitations but ''must be measured by standards that satisfy the First Amendment''; that there has been ''a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials''; that constitutional protection does not turn upon the truth or popularity of the ideas and beliefs offered; that erroneous statement is ''inevitable in free debate, and that it must be protected

if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive' "; that neither factual error nor defamatory content removes "the constitutional shield from criticism of official conduct"; that the allowance of the defense of truth does not save the state libel rule; that public discussion of official conduct enjoys a privilege under the First and Fourteenth Amendments in the absence of actual malice; that the Alabama rule which presumes malice, where general damages are concerned, is inconsistent with constitutional limitations; that the Court had the duty to review the evidence to see whether it could constitutionally support a finding of actual malice; that a statement by the newspaper's officer that he thought the advertisement was substantially correct was at least a reasonable opinion and there was no evidence to impeach his good faith in holding it; that under the circumstances the failure to retract was not adequate evidence of malice for constitutional purposes; and that the evidence at most supported a finding of negligence which fell short of actual malice. At footnote 23, on p. 283 of 376 U.S., the Court significantly observed:

> "We have no occasion here to determine how far down into the lower ranks of government employees the 'public official' designation would extend for purposes of this rule, or otherwise to specify categories of persons who would or would not be included. Cf. *Barr* v. *Matteo*, 360 U.S. 564, 573-575. Nor need we here determine the boundaries of the 'official conduct' concept. It is enough for the present case that respondent's position as an elected city commissioner clearly made him a public official, and that the allegations in the advertisement concerned what was allegedly his official conduct as Commissioner in charge of the Police Department."

Mr. Justice Black, with Mr. Justice Douglas joining him, concurred separately on the ground that the First and

Appendix B
Opinion Below

Fourteenth Amendments "completely prohibit" a state from awarding damages to public officials against critics of their official conduct and that the defendants "had an absolute, unconditional constitutional right to publish . . . their criticisms of the . . . agencies and officials". P. 293 of 376 U.S. Mr. Justice Goldberg, with Mr. Justice Douglas joining him, separately concurred and stated his "belief that the Constitution affords greater protection than that provided by the Court's standard to citizen and press in exercising the right of public criticism". P. 298 of 376 U.S. Yet he carefully pointed out, p. 301, that "This is not to say that the Constitution protects defamatory statements directed against the private conduct of a public official or a private citizen".

The companion question as to whether the rule of *New York Times* "also limits state power to impose criminal sanctions for criticism of the official conduct of public officials" promptly presented itself in *Garrison* v. *Louisiana*, 379 U.S. 64, 67 (1964). That case concerned remarks made by a district attorney about judges of the criminal district court of his Louisiana parish. The Court's answer to the question was flatly in the affirmative:

> "The constitutional guarantees of freedom of expression compel application of the same standard to the criminal remedy. . . . [O]nly those false statements made with the high degree of awareness of their probable falsity demanded by *New York Times* may be the subject of either civil or criminal sanctions. For speech concerning public affairs is more than self-expression; it is the essence of self-government. . . .
>
> "The use of calculated falsehood, however, would put a different cast on the constitutional question. . . . Hence the knowingly false statement and the false statement made with reckless disregard of the

truth, do not enjoy constitutional protection." Pp. 74-75 of 379 U.S.

In answering the suggestion that the alleged defamatory statement was an attack upon the judges' personal integrity, rather than on their official conduct, the Court held that the rule of *New York Times* "is not rendered inapplicable merely because an official's private reputation, as well as his public reputation, is harmed". P. 77 of 379 U.S. Justices Black, Douglas, and Goldberg each filed a concurring opinion reflecting views about as expressed in *New York Times.*

The Court made the same ruling in *Moity* v. *Louisiana,* 379 U.S. 201 (1964), concerning alleged defamation of a district attorney of a Louisiana parish (see *State* v. *Moity,* 245 La. 546, 159 So.2d 149 (1963)), and in *Henry* v. *Collins,* 380 U.S. 356 (1965), concerning a statement relating to a Mississippi county attorney and chief of police.

The Supreme Court's most recent expression on this subject is *Rosenblatt* v. *Baer,* 383 U.S. 75 (1966). This was a New Hampshire civil libel action against the author of a newspaper column for allegedly defamatory and false comment concerning the plaintiff's performance when he was a supervisor of a county recreation area. The plaintiff was employed by elected county commissioners. The trial antedated the Supreme Court's decision in *New York Times.*

The Court held that the question whether the plaintiff was a "public official" within *New York Times* was not to be answered under state law standards. It made specific reference to its footnote 23 in *New York Times* and here, too, observed that "No precise lines need be drawn for the purposes of this case" in determining the reach of the "public official" concept. It stated,

Appendix B
Opinion Below

> "There is, first, a strong interest in debate on public issues, and, second, a strong interest in debate about those persons who are in a position significantly to influence the resolution of those issues. . . . It is clear, therefore, that the 'public official' designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs." [footnote omitted] P. 85 of 383 U.S.

The Court noted, p. 86, the tension between society's interest in preventing and redressing attacks upon reputation, on the one hand, and, on the other, "the values nurtured by the First and Fourteenth Amendments" and stated that "when interests in public discussion are particularly strong . . . the Constitution limits the protections afforded by the law of defamation". Because *New York Times* had not been decided when Baer's case went to trial, the Court felt his presentation was not shaped to the "public official" issue. The case, accordingly, was remanded and Baer was given an opportunity to prove that he was outside *New York Times* or, if not, that he presented a jury question of malice. Again, a significant feature is the Court's footnote 12 on p. 86 of 383 U.S.:

> "We are treating here only the element of public position, since that is all that has been argued and briefed. We intimate no view whatever whether there are other bases for applying the *New York Times* standards—for example, that in a particular case the interests in reputation are relatively insubstantial, because the subject of discussion has thrust himself into the vortex of the discussion of a question of pressing public concern."

Mr. Justice Clark, without comment, concurred in the result. Mr. Justice Douglas separately concurred and said,

p. 90, "I cannot relate [the term 'public official'] only to those who, by the Court's standard, are deemed to hold public office"; he asked the question, "But since freedom of speech is now the guideline, do state libel laws have any place at all in our constitutional system, at least when it comes to public issues?" Mr. Justice Stewart separately concurred with the observation that this and the *New York Times* and *Garrison* cases turn on the proposition that state defamation laws cannot constitutionally be converted into laws against seditious libel but that the First Amendment is not "the only guidepost in the area of state defamation laws". Pp. 91-92. Mr. Justice Black, with Mr. Justice Douglas joining him, concurred in the reversal but dissented as to the new trial direction. He repeated his observation in *New York Times* that "An unconditional right to say what one pleases about public affairs is what I consider to be the minimum guarantee of the First Amendment". He would not allow "the right to criticize a public agent engaged in public activities" to depend upon his being "arbitrarily labeled a 'public official' ". P. 95. Mr. Justice Harlan dissented from a part of the opinion with which we are not here concerned. Mr. Justice Fortas dissented on the ground that the writ of certiorari had been improvidently granted.

It is of interest to note that the *New York Times* principle was extended by the Court through the path of preemption into the field of labor relations in a case decided the same day as *Rosenblatt* v. *Baer*. *Linn* v. *United Plant Guard Workers*, 383 U.S. 53, 65 (1966).

We feel that the majority opinions in these Supreme Court cases (all of which were written by Mr. Justice Brennan except, possibly, the per curiams in *Moity* v. *Louisiana* and *Henry* v. *Collins*) establish for us the fol-

lowing: (1) The Court recognizes as a national "principle" the desirability of uninhibited debate about public issues. (2) It also recognizes "a strong interest in debate about those persons who are in a position significantly to influence the resolution of those issues". (3) In the absence of malice, the First and Fourteenth Amendments afford a privilege to public discussion of official conduct even though it has some factually erroneous or defamatory content. (4) Malice, in this connection, equates with knowledge of the falsity of the statement or with reckless disregard of whether it is false or not. (5) The Court thus far has specifically refrained from fixing a limit for its concept of "public official", either among the ranks of government employees "or otherwise". (6) It has, however, included within the term a city commissioner, a trial judge, a prosecutor, and a chief of police, and it has not excluded a recreation supervisor appointed by elected county commissioners. (7) Similarly, the Court has not yet fixed a boundary for its "official conduct" concept. (8) At least two present members of the Court feel that the majority's standard for privilege falls short of appropriate constitutional protection. (9) The Court thus far has also refrained from expressing a view as to "whether there are other bases" for applying the standards of *New York Times*, specifying, as a possible example, the subject who "has thrust himself into the vortex of the discussion of a question of pressing public concern". (10) The Court has applied the *New York Times* principle by analogy in the labor field.

These Supreme Court cases, therefore, may not take us so far as the facts of the present case or provide incontestably controlling precedent for us here; rather, we are concerned with the express reservations of the *New York Times* and *Rosenblatt* footnotes. Concededly, Dr. Pauling

was not a public official and the Globe-Democrat editorial, therefore, was not one in criticism of official conduct in the governmental sense.

We feel, however, that the implications of the Supreme Court's majority opinions are clear. Professor Pauling, by his public statements and actions, was projecting himself into the arena of public controversy and into the very "vortex of the discussion of a question of pressing public concern". He was attempting to influence the resolution of an issue which was important, which was of profound effect, which was public and which was internationally controversial. Because of his world prominence—a factor stressed by his counsel in the present case—he was in a position of some influence on the problem's resolution. He obviously deemed himself influential and he was undertaking to provide leadership among academic and scientific people and to bring forces from many nations of differing political ideologies to bear upon the problem. Although Dr. Pauling did not take the stand himself, the record here clearly establishes, by evidence adduced primarily by the plaintiff, his preparation of the petition to the United Nations, his taking the lead in soliciting supporting signatures, his devotion of a substantial portion, "perhaps a third", of his time to attracting public attention to the problems of nuclear testing, his speaking and writing widely on the subject, and even his participation in sign carrying and picketing on the issue near the White House and elsewhere. His instigation of the several lawsuits we have described above is a self-evident additional factor.

We recognize that it is arguable that the *New York Times* rule should not be extended beyond governmental officials. One may point out that many public officials enjoy either an absolute or conditional privilege as to

statements made in the line of duty and that the Supreme Court recognized this in *New York Times,* p. 282 of 376 U.S., and in *Garrison,* p. 74 of 379 U.S., and used it in support of its conclusions in those cases, namely, to avoid giving "public servants an unjustified preference over the public they serve". One may say, too, that, while the public interest requires free and open discussion of the qualifications, conduct and views of public officials, there is no comparable need as to the attributes of private citizens, however much public attention they have succeeded in acquiring. We feel, however, that the Supreme Court's use of the undesirable preference argument is not a significant part of the rationale of its cases and that it was employed only as a final or clinching factor. Indeed, in *Rosenblatt* v. *Baer,* footnote 10, pp. 84-85 of 383 U.S., the Court specifically denies that it ties the *New York Times* rule to the rule of official privilege. "The public interests protected . . . are interests in discussion, not retaliation. . . ." And the Court itself has pointed out that the reciprocal privileges are not congruent.

We also feel that a rational distinction cannot be founded on the assumption that criticism of private citizens who seek to lead in the determination of national policy will be less important to the public interest than will criticism of government officials. A lobbyist, a person dominant in a political party, the head of any pressure group, or any significant leader may possess a capacity for influencing public policy as great or greater than that of a comparatively minor public official who is clearly subject to *New York Times.* It would seem, therefore, that if such a person seeks to realize upon his capacity to guide public policy and in the process is criticized, he should have no greater remedy than does his counterpart in public office.

Appendix B
Opinion Below

We hold that the principle of *New York Times* and its companion cases is applicable here and that these particular activities of this particular plaintiff fall into that area where the First and the Fourteenth Amendments of the Constitution of the United States afford privilege to critical comment which is free from malice.

We note nothing significantly to the contrary to all this in the developing law in the state and lower federal courts. The application of the *New York Times* principle seems to be an expanding and not a restricting one. It has been applied, over opposition, to appointed as well as to elected officials. *Rosenblatt* v. *Baer,* supra (semble); *Pape v. Time, Inc.,* 354 F.2d 558, 559-60 (7 Cir. 1965), cert. denied .... U.S. ... (deputy chief of detectives and lieutenant of police); *Gilligan* v. *King,* 48 Misc.2d 212, 264 N.Y.S.2d 309 (Sup. 1965) (police lieutenant); *Thompson* v. *St. Amant,* 184 So.2d 314, 321 (La. App. 1966) (deputy sheriff); *McNabb* v. *Tennessean Newspapers, Inc.,* ... Tenn. App. ..., 400 S.W.2d 871 (1965) (chairman of County Democratic Primary Board); Rives, C.J., dissenting in *Curtis Publishing Co.* v. *Butts,* 351 F.2d 702, 721 (5 Cir. 1965), petition for cert. pending. See *Application of Levine,* 97 Ariz. 88, 397 P.2d 205, 211 (1964) (director of the FBI). *Contra, Butts* v. *Curtis Publishing Co.,* 242 F.Supp 390, 394 (N.D. Ga. 1964) (university athletic director), affirmed on other grounds, *Curtis Publishing Co.* v. *Butts,* supra, pp. 709-13 of 351 F.2d.

It has been applied to candidates for office as well as to incumbents. *Block* v. *Benton,* 44 Misc.2d 1053, 255 N.Y.S.2d 767 (Sup. 1964); *State* v. *Browne,* 86 N.J. Super. 217, 206 A.2d 591, 598-99 (App. Div. 1965). See *Pauling* v. *News Syndicate Co.,* 335 F.2d 659, 671 (2 Cir. 1964), cert. denied 379 U.S. 968; *Gilberg* v. *Goffi,* 21 App. Div.2d 517, 251

N.Y.S.2d 823 (Sup. 1964), aff'd 15 N.Y.2d 1023, 207 N.E.2d 620, 260 N.Y.S.2d 29 (1965); *Clark* v. *Allen*, 415 Pa. 484, 204 A.2d 42, 44 (1964). This view is afforded substance by the quotations from *Coleman* v. *MacLennan*, 78 Kan. 711, 98 Pac. 281 (1908), which appear in the *New York Times* opinion itself, pp. 280-82 of 376 U.S.

And the principle has also been applied to persons in their private capacities. Two cases concerning private citizens arose out of an election contest and affected the plaintiff by virtue of his relationship to the candidate. *Gilberg* v. *Goffi*, supra (partner in mayor's law firm), and, as a matter of state common law, *Pearson* v. *Fairbanks Publishing Co.*, ... Alaska ..., 413 P.2d 711, 714 (1966). Compare, however, *Powell* v. *Monitor Publishing Co.*, ... N.H. ..., 217 A.2d 193 (1966). But there are at least two flat holdings that the principle applies where a person of prominence involves himself in a matter of great public concern. *Walker* v. *Courier-Journal & Louisville Times Co.*, 246 F.Supp. 231 (W.D. Ky. 1965); *Pauling* v. *National Review, Inc.*, ... Misc.2d ..., 269 N.Y.S.2d 11 (Sup. 1966). Judge Friendly's dictum in *Pauling* v. *News Syndicate Co.*, supra, p. 671 of 335 F.2d, displays the logical application of the principle to this situation. Compare *Nusbaum* v. *Newark Morning Ledger Co.*, 86 N.J. Super. 132, 206 A.2d 185, 198-99 (App. Div. 1965). *Contra, Associated Press* v. *Walker*, 393 S.W.2d 671, 680 (Tex. Civ. App. 1965), an opinion with no citation of *New York Times*. Negative implications also appear to be present in *Clark* v. *Pearson*, 248 F.Supp. 188, 195 (D.D.C. 1965), and in *Harper* v. *National Review, Inc.*, 33 L.W. 2341 (N.Y. Sup. 1964), aff'd 263 N.Y.S.2d 292 (App. Div. 1965).

There are, of course, fact situations where the courts understandably have refused to apply the principle. These include cases where the subject, although perhaps a public

figure, did not conduct himself or speak out on a matter of public import, *Dempsey* v. *Time, Inc.*, 43 Misc.2d 754, 252 N.Y.S.2d 186, 189 (Sup. 1964), aff'd 22 App. Div. 2d 854, 254 N.Y.S.2d 80 (1964) (prizefighter); *Spahn* v. *Julian Messner, Inc.*, 43 Misc.2d 219, 250 N.Y.S.2d 529, 535 (Sup. 1964), aff'd 23 App. Div. 216, 260 N.Y.S. 2d 451 (1965) (baseball pitcher); *Faulk* v. *Aware, Inc.*, 14 N.Y.2d 954, 202 N.E.2d 372, 253 N.Y.S.2d 990 (1964), cert. denied 380 U.S. 916 (radio and television performer); *Lorillard* v. *Field Enterprises, Inc.*, 65 Ill.App.2d 65, 213 N.E.2d 1, 7 (1965) (socialite), or where the subject was a person prominent only in another country, *Fignole* v. *Curtis Publishing Co.*, 247 F.Supp. 595 (S.D.N.Y. 1965) (Haitian political figure); *Youssoupoff* v. *Columbia Broadcasting System, Inc.*, 48 Misc.2d 700, 265 N.Y.S.2d 754, 756-59 (Sup. 1965) (Russian political figure). Some of these cases assume an invasion of privacy posture.

As indicated above, however, once the principle of *New York Times* is accepted—and our only choice is to accept it—logic commands that it be applied to a person such as Dr. Pauling when, as here, he has projected himself into the arena of public policy, public controversy, and "pressing public concern".

This brings us to the issue of malice in the present case. As has been noted, *New York Times* has an exception and affords no protection for a false statement "made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not", pp. 279-80 of 376 U.S., or, as said in *Garrison* v. *Louisiana*, p. 74 of 379 U.S., "with the high degree of awareness of [its] probable falsity demanded by *New York Times*".

Does the record here conclusively reveal this type of malice or, if not, does justice require that the case be

remanded for a new trial as the Supreme Court ordered in *Rosenblatt* v. *Baer*, supra? We arrive at a negative answer to both questions.

First, we repeat our observation that, although at the time of the trial of this case *New York Times* had just been decided, it nevertheless had appeared before the trial began and its presence was known to both counsel and to the trial court. The defendant newspaper, at the commencement of the trial, moved to amend its answer to incorporate a defense based on *New York Times*. Prior to the submission of the case to the jury this motion was granted. The answer, as then amended, made specific reference to the *New York Times* decision and its controlling precedent in the absence of actual malice. The district court stated that, although it felt *New York Times* was not applicable here, the amendment would serve to preserve the point for appeal. The issue, therefore, was obviously before court and counsel at the trial and we cannot assume that the case was not framed and tried, or need not have been so framed and tried, under the hovering presence of *New York Times*.

Further, the plaintiff asserts that he alleged and proved malice. The complaint did refer to malice, although perhaps only in the pre-*New York Times* and state law sense. It described the accused editorial as "malicious" and it asserted that it was published "when defendant knew or should have known that [its accused statements] were false". Plaintiff's counsel referred to malice in his opening statement and in his argument to the jury. The claimed proof of malice consisted of the defendant's publication in its newspaper of letters to the editor, a cartoon, and a series of adverse editorial comments on Dr. Pauling both before and after the editorial of October 10; a depo-

sition concession by the defendant's editor that "We felt he was about to be cited, he wasn't"; and the fact the accused material was an editorial rather than a paid advertisement, as in *New York Times,* or something furnished by a national agency, as in *Walker,* supra.

Our conclusion is that these factors of asserted proof add up to something far less than the definition of actual malice prescribed for the *New York Times* exception and fall short of "the convincing clarity which the constitutional standard demands". Pp. 285-86 of 376 U.S. Singly or in the aggregate, these factors might possibly be found to constitute reportorial negligence or antagonism or contempt for Dr. Pauling and his views and methods. Yet, each and all of these have been held to be less than "actual malice". *New York Times,* p. 288 of 376 U.S. (negligence); *Garrison* v. *Louisiana,* pp. 73 and 78-79 of 379 U.S. (hatred, ill will, negligence); *Henry* v. *Collins,* p. 357 of 380 U.S. (intent to inflict harm); *Rosenblatt* v. *Baer,* p. 84 of 383 U.S. (negligence).

In any event, the jury returned a verdict in favor of the defendant and did so on instructions more favorable to the plaintiff than instructions based on *New York Times* could have been.[2] The instructions given were

---

[2] The court instructed the jury that the offending statement was susceptible of two meanings; that the jury was to determine which of the two meanings an ordinary reader would give the material; that under the first possible meaning, if the statement did not directly impute a crime, then, for the publication to be libelous,

> "you must also find that the article was a malicious defamation of the plaintiff. . . . By malice is meant malice in fact as distinguished from presumed malice, that is, the actual presence of an improper motive on the part of the defendant implying the purpose and desire to injure. It may, and in common acceptation does, denote that the defendant was

based on the pre- and ex-*New York Times* Missouri law of libel. See *Riss.* v. *Anderson,* 304 F.2d 188, 194-95, 198 (8 Cir. 1962) and cases cited. The burden of proof, of course, is on Pauling. *New York Times,* p. 284 of 376 U.S.; *Pape* v. *Time, Inc.,* supra, p. 560 of 354 F.2d. The jury by its verdict has found that this burden was not sustained even on the less stringent standards enunciated by the trial court.

We therefore find on this record nothing parallel to the factors which prompted the Supreme Court to remand *Rosenblatt* v. *Baer* for a new trial. This case was tried after *New York Times.* The exception to the rule was there for the plaintiff to see and to meet if he could, was apparent and known by counsel, and, by the jury's verdict, was not met.

---

actuated by spite or ill will towards the plaintiff, but in its legal significance such degree of personal hostility is not in all events essential. On the contrary, it is the willfullness or evil intent of the act—the wanton disregard of the rights and interests of the party injured—which suffices to render the act malicious in its legal sense; and hence the usual definition that by malice is meant the intentional doing of a wrongful act without just cause or excuse. It is likewise a wrong motive, which would tend to show malice to state something as the truth without knowing whether it is true, recklessly, and without any reasonable attempt to find out about it or with complete disregard of other known facts";

that under the second possible meaning, namely, a violation of 2 U. S. C., § 192, the statement was libelous per se by directly imputing a crime; and that then "The Court further instructs the jury that it is libelous to maliciously defame any person by publishing falsely in a newspaper of and concerning such person that he has been cited for contempt of Congress and that there has been an affirmation of contempt of Congress by a United States Court. Such a publication is said to be actionable per se or of itself. By this is meant that such publication if false is presumed to be malicious, and it is not necessary to prove any express malice in order to warrant a verdict for the plaintiff . . ."

Appendix B
Opinion Below

This makes it unnecessary for us to consider the plaintiff's claimed errors as to instructions, evidence, and trial conduct. The judgment dismissing the action on the merits is affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX

Saint Louis Globe-Democrat editorial in its issues of October 10, 1960:

"GLORIFICATION OF DECEIT.

"The petition of 140 members of the Washington University faculty in support of the defiance of Linus Pauling of the United States Senate dangerously compromises the good name and patriotism of that great University.

"As might be expected, among the first 16 organizers and signers are Edward U. Condon, once described by a House Committee as the 'weakest link in America's security chain,' and Barry Commoner, a man who has consistently fought every attempt to keep America sufficiently strong in the nuclear field to maintain peace by deterring aggression.

"The background of the present attempt of the Senate to defend its own integrity and that of the nation is this: Three years ago, Pauling organized a petition which obtained a number of signatures calling for the United Nations to bar nuclear testing. At the very least, the petition was identical with Russian policy then and now,

which calls for cessation of nuclear testing and disarmament without the safeguards of inspection.

"The United States national policy agrees on the desirability of both aims, but insists upon the wholly realistic safeguard of foolproof inspection. This same approach recognizes the utter folly of trusting the Russians to keep their word on anything, considering the overwhelming evidence of their consistent cheating on every commitment they have made in the past 40 years.

"The Senate Internal Security Subcommittee very properly felt that a movement of this sort, which if successful might have laid America and the Free World bare to attack and defeat by the Communists, might have been Communist inspired.

"The Senate subcommittee called Pauling to testify as to who helped him collect the petitions. Pauling contemptuously refused to testify and was cited for contempt of Congress. He appealed to the United States District Court to rid him of the contempt citation, which that Court refused to do. The appeal from the lower court's affirmation of contempt is expected to be handed down by the Supreme Court today.

"It would be idle to guess as to that decision, but we cannot but note that the Supreme Court has been woefully weak in upholding the basic right of the nation to defend itself against the Communist conspiracy in recent years.

"The basic issue, regardless of a Supreme Court decision which might, like others, have to be repaired by the Congress, is whether Pauling or anyone else should testify as to his accomplices. Pauling insists that he is a better judge than the Congress or any court as to what

is right and what is wrong. The Senate does not concur in this view.

"The Washington University group clothes their defense of Pauling in self-righteous and ringing phrases—'historic service to humanity,' 'highest patriotism,' 'constitutionally guaranteed freedoms' and 'civic duties.'

"These great words are, like the phrases of the Communists, a prostitution of the best and most meaningful words in our language in their present connection, for their own purposes.

"The basic question is whether the Senate can inquire into matters concerning the defense of the nation, and whether the United States should be able to defend itself by any and all means at its disposal against threats or the well-founded fears of threats against its own security.

"We believe it should. We believe that the Senate acted in good conscience in investigating a proposal which might have wrecked the strength and security of the state.

"Much is made of the fact that Pauling is a Nobel Prize winner. That is no guarantee of anything more than proficiency in chemistry. It certainly is no guarantee of either patriotism or correctness in foreign policy. It above all does not cloak him with an immunity to defy the Senate and to decide on his own prerogative what is best for America.

"A great St. Louis institution is being badly used, nor is it the first time, by a group which glorifies deceit and evasion in the outrageous guise of freedom of speech and conscience."

APPENDIX C.

JUDGMENT BELOW.

UNITED STATES COURT OF APPEALS
For the Eighth Circuit.

No. 18,082. September Term, 1965.

Linus Pauling,

Appellant,

vs.

Globe-Democrat Publishing Company, a Corporation.

Appeal from the United States District Court for the Eastern District of Missouri.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the Judgment of the said District Court dismissing this action on the merits be, and it is hereby, affirmed.

June 21st, 1966.

APPENDIX D.

Exhibit 8—Page 4A St. Louis Globe-Democrat, October 12, 1960 (Part only).

DR. LINUS PAULING
Before Senate Unit
—A. P. Wirephoto

APPENDIX D.

Exhibit 5—Page 10A St. Louis Globe-Democrat, March 24, 1961 (Part only).

INDEX.

Page

Question I. Certiorari not necessary to review first question presented 1

Question II:

a. Petitioner not entitled to another "opportunity to prove actual malice" 3

b. Petitioner is bound by his theory below: that malice was irrelevant 7

c. Malice was not proved anyway 13

Conclusion 17

Table of Cases Cited.

Farley v. Evening Chronicle Publishing Co., 113 Mo. App. 216, 87 S. W. 565, 569 (1905) 8

F. W. Woolworth Co. v. Contemporary Arts, 344 U. S. 228, 231 (1952) 4

Garrison v. State of Louisiana, 379 U. S. 64, 73 (1964) 14

Helvering v. Gowran, 302 U. S. 238, 245 (1937) 7

Helvering v. Wood, 309 U. S. 344 (1940) 7

In re Linda Coal and Supply Co., 255 F. 2d 653, 656-657 (3rd Cir. 1958) 11

New York Times Co. v. Sullivan, 376 U. S. 254, 279, 283 (1964) 2, 4, 5, 11, 12, 13, 14, 16

Rosenblatt v. Baer, 383 U. S. 75 (1966) 6, 7, 17

South Ottowa v. Perkins, 94 U. S. 154, 158 (1877) ... 4

Thomas v. Taylor, 224 U. S. 73 (1912) 7

Virginian Railway Co. v. Mullens, 271 U. S. 220, 227-228 (1926) 11, 15

Washington Post Co. v. Keogh, 365 F. 2d 965 (1966).. 16

Statutes and Other Authorities Cited.

2 U. S. C., § 192 .....10, 17

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1966.

No. 511.

LINUS PAULING,
Petitioner,

vs.

GLOBE-DEMOCRAT PUBLISHING COMPANY,
Respondent.

BRIEF

In Opposition to Grant of Certiorari to the United States Court of Appeals for the Eighth Circuit.

I.

"QUESTIONS PRESENTED

"1. Whether the rule of New York Times Co. v. Sullivan . . . is to be extended to petitioner, who is not a public official or public employee, but has expressed his views on matters of public concern, where the libel relates to his involuntary appearance, under subpoena, before a subcommittee of the United States Senate." Petition, p. 2.

Except for the substitution of the future for the past tense, and the omitted argumentative statement of the

Times rule, respondent agrees that there is presented by this record the first of the two "Questions Presented," quoted above from Petition, p. 2.

Respondent does not agree, however, that certiorari should be granted on that account.

This court has now granted the writ in Associated Press v. Walker, No. 150, and in Curtis Publishing Company v. Butts, No. 37, and the questions certain to be resolved in those cases, and especially in A. P. v. Walker, will resolve the above question in this case.

The extent of Pauling's vast activities as a volunteering "public man" is adequately demonstrated by the opinion below and by the testimony of Mrs. Pauling as set out in the Supplemental Record below (S. R. 6, et seq.). It would seem that if the rule of *New York Times* has application to any other "categories of persons" (as the court intimated in the already-famous footnote 17) than occupants of and candidates for public office, then of such categories of persons the category in which the record places Dr. Pauling must be the prototype.

We can imagine no meaningful distinction anent such categories, as between Dr. Pauling and General Walker, their activities and their consequent assumption of the risk of inaccurate reporting (to use an antique phrase). Neither had any personal axe to grind. Neither concurrently held any public office. Both were men of prominence and recognition with histories of leadership, and a conviction of obligation flowing from their positions. Both were dismayed by the conduct of their government. Both took a public stand intended to arouse public interest,—nay, public action,—on the issues to which they had dedicated themselves. In effect, both invited public discussion of themselves and their activities, in order to further the publicity of their causes.

Tros Tyriusque mihi nullo discrimine agetur: the law, like Dido, applies itself alike to good guys and to bad guys.

In view of the grant of certiorari in A. P. v. Walker, and the inevitable resolution of the seemingly identical question presented in that case, thoroughly researched in the opinion below, in *Walker,* and in *Butts,* there appears to be no reason, under 19.1 (b) of the rules of this Court, for the grant of certiorari in this case also, to review again the same question.

II.

"QUESTIONS PRESENTED

"2. If so, whether petitioner has already proved, or is entitled to an opportunity to prove 'actual malice' under the new rule," etc.

Respondent does not agree that the second "Question Presented" quoted above from Pet., pp. 2 and 3, is properly raised by the record in this case.

a.

Petitioner Not Entitled to Another "Opportunity to Prove Actual Malice".

Petitioner argues (Pet. 20-21):

> "No plaintiff can be held at his peril to a rule that he must anticipate a novel extension of the law and must direct his evidence and instructions to meet an extension which no court has yet made and which the trial judge had already rejected."

No authority is given for this extraordinary statement.

In every appealed case the application of the law is disputed; otherwise there would be no appeal. Petitioner's proposition would mean that there never could be

an end to litigation; for every decision of every court is made *for the first time* on the precise facts, authorities and arguments then before it.

The assertion is, in the last analysis, a plea of ignorance of the law, which is in violation of the firmest of all legal presumptions:

> "Not only the courts, but individuals, are bound to know the law, and cannot be received to plead ignorance of it." South Ottowa v. Perkins, 94 U. S. 154, 158, 23 L. Ed. 260, 269.

Neither can petitioner find comfort in the ruling of the trial judge that *New York Times* was inapplicable; for it was the petitioner, himself, who prevailed upon the Court to so rule. F. W. Woolworth v. Contemporary Arts, 344 U. S. 228, 231, 73 S. Ct. 222, 224.

The announcement in *Times* of the principle that the First Amendment of the United States Constitution governs state-law libel suits arising out of public discussion of public issues, not only preceded this trial, but the announcement had been explicitly brought to petitioner's attention.

Before the commencement of the trial respondent sought leave to amend its amended answer to plead that the rule of the New York Times case was applicable to the claim of Professor Pauling for the very reason ultimately adopted by the Court of Appeals. Petitioner objected to the amendment, and the trial judge at first denied leave to file the amendment, on the ground that the rule of the New York Times case was not applicable to Pauling (Pet. p. 10). But before making up the charge, the Court permitted the amendment to be made "to preserve the point" (R. 135, 136), and the amendment appears at R. 30-31. The new matter pleaded reads as follows:

> "19. Further answering, defendant states that plaintiff voluntarily sought public expression of his

> views on national policy and invited public comment thereon, and that under the Constitution of the United States as interpreted by the United States Supreme Court on Monday, March 9, 1964, in New York Times and Abernathy v. Sullivan, 32 Law Week 4184, he cannot recover for libel arising out of such comment unless in addition to being defamatory and false such comment was based upon actual malice."

Thus there can be no doubt that before commencing the trial, as well as before offering his requested instructions, petitioner was aware of the decision and of defendant's assertion that the New York Times rule was applicable to his case.

Furthermore, since the amendment gave notice of the availability of the opinion in published form, petitioner cannot deny that he was apprised of the constitutional predicate of the New York Times rule and the broad scope of its applicability, which was clearly stated in the opinion. Indeed, this Court, while deciding only the case before it, had given clear warning that the rule of law would be applied wherever the principle announced might require.

In footnote 23 the court stated:

> "We have no occasion here to determine how far down into the lower ranks of Government employees 'the public official' designation would extend for purposes of this rule, *or otherwise to specify categories of persons who would or would not be included.*"

Petitioner speaks of "respondent's *Times* defense," "to preserve the defense on appeal," "the *Times* defense," and "respondent's *Times* argument" (Pet. 19).

But this is a total misconception of the *New York Times* rule, which puts the burden of proof *on the plaintiff* (l. c. 279, l. c. 726):

> "The constitutional guaranties require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct *unless he proves* that the statement was made with 'actual malice'—that is, with knowledge that it was false, or with reckless disregard of whether it was false or not."

In Rosenblatt v. Baer, 383 U. S. 75, 86 S. Ct. 669, Baer had recovered a verdict in a civil libel action which the New Hampshire Supreme Court on appeal affirmed on the ground that the rule of the New York Times opinion was inapplicable. This Court held the rule applicable on the record made, reversed the judgment, and remanded the case for a new trial, saying (l. c. 677):

> "The record here, however, leaves open the possibility that respondent could have adduced proofs to bring his claim outside the New York Times rule. Moreover, even if the claim fails within New York Times, the record suggests respondent may be able to present a jury question of malice as therein defined. *Because trial was had before New York Times,* we have concluded that we should not foreclose him from attempting retrial of his action."

The plain implication of this holding is that if the trial had taken place *after* the New York Times decision Baer would have been foreclosed from a new trial even though he had prevailed both in the trial court and in the appellate court.

Pauling's case, unlike Baer's, was tried after the New York Times decision and in full knowledge of it, of its holding, and of the defendant's position that Pauling was in one of the "categories of persons who would be included" within it.

Also, as the Court of Appeals pointed out [Pet. 21 (b), 22 (b)], Pauling's case is distinguishable from Baer's

on the additional ground that Baer had obtained a verdict and judgment below, whereas Pauling had lost and was an appellant. The significance of this additional distinction between Baer's case and Pauling's lies in the rule of law that while an appellee may advance in the appellate court any theory which will sustain the judgment below, an appellant, on the other hand, is limited to urging on his appeal the same theory of liability or defense which he pursued in the trial court. Helvering v. Gowran, 302 U. S. 238, 245, 58 S. Ct. 154, 158, 82 L. Ed. 224; Helvering v. Wood, 309 U. S. 344, 348-349, 60 S. Ct. 551, 84 L. Ed. 796.

In Thomas v. Taylor, 224 U. S. 73, 32 S. Ct. 403, 406, this court held:

> "Besides, judgment cannot be reversed upon the mere suggestion that, upon some other theory than that upon which the case was tried, evidence might have been introduced which might have changed the result."

Under the rationale of the holding in Rosenblatt v. Baer, therefore, the petitioner has had his day in court, and is not entitled to another. The case he pleaded and proved and the relief he sought on that day must determine his ultimate rights. The New York Times rule was applicable, and his proof simply was not sufficient to permit the only relief he sought. The Court of Appeals so held [Pet. 21 (b)]. Unless manifestly erroneous, this determination disposes of the case.

b.

Petitioner Is Bound by His Theory Below: That Malice Was Irrelevant.

Malice, as this Court pointed out with considerable care in the New York Times opinion, is quite a different mat-

ter from malice as it was defined in the Alabama law (l. c. U. S. 283, S. Ct. 727). The prior Missouri law is in accord with that of Alabama except that punitive damages must be separately found in the verdict (Mo. R. C. P. 71.06). The Missouri definition of malice is most aptly stated in Farley v. Evening Chronicle Publishing Company, 113 Mo. App. 216, 87 S. W. 565, 569, as follows:

> "... The word 'malice' has been declared by an eminent jurist rarely to have any meaning in law, except a misleading one. Justice Stephen, as quoted in Newell, Slander & Libel (2d Ed.), p. 317. Another judge has deplored the use of the word, and the maintenance of the doctrine that malice is essential in cases like this (Lord Bromwell, in Abrath v. R. R., 11 App. Cas. 253), because malice, though always insisted on in theory, is dispensed with in every comprehensible sense. Only legal malice is exacted, and on analysis this sinks into a myth or fiction; for so much malice as is necessary to afford compensation for actual damage is inferred from the fact that a false writing was published concerning the plaintiff, although in truth the publisher felt no ill will, and believed he was telling the truth. This result eliminates malice from actions for libel, as a practical factor, save as a reason for awarding more than compensative damages or overcoming the defense of privileged communication ..."

In accordance with the foregoing statement of the law, petitioner took the constant and positive position from one end of the trial to the other, and as well on appeal* that, as far as the question of defendant's liability to the petitioner is concerned, there was no occasion for the jury to make any finding at all with respect to malice of any

---

* Initial Brief of Appellant in the Court of Appeals does not even mention *New York Times*. Cases cited, Point IV.

sort—presumed, implied, fictional, actual or per-New York Times.

His petition in this Court now states (Pet. 9):

> "*He* [petitioner in his complaint] *alleged actual malice,* and sought compensatory and punitive damages" (R. 12).

This is in error, for the only mention of malice in the complaint was (R. 12):

> "13. The aforesaid malicious, false, dafamatory, and libelous publication damaged plaintiff in the amount of One Hundred and Fifty Thousand Dollars ($150,000.00)."

That the malice petitioner referred to was not actual malice, and especially not actual malice in the New York Times sense, but was the "inferred" "legal malice" described in the Farley opinion, is simply incontrovertible on this record. His position in this respect is shown in:

1. Plaintiff's Motion for Summary Judgment (R. 27), which postulates no finding of malice.

2. Plaintiff's Motion for Directed Verdict as to Liability (at the close of defendant's case) (R. 29), which postulates no finding of malice.

3. Plaintiff's Motion for a Directed Verdict as to Liability (at the close of all the evidence) (R. 29), which postulates no finding of malice.

4. Plaintiff's Refused Instruction A (R. 153), which would direct a verdict without any finding of malice.

5. Plaintiff's Refused Instruction E (R. 156), which ends: "and such evidence [of actual malice] may be considered by you *solely in aggravation of punitive damages.*"

6. Plaintiff's Motion to Set Aside Verdict and Enter Directed Verdict for Plaintiff as to Liability (R. 33), which postulates no finding of malice.

7. Motion to Set Aside Verdict and to Grant a New Trial, Items 3, 4, 5, 21, 23 and 25, which request a new trial on the theory that liability of respondent was obligatory, irrespective of any finding of malice, and Items 7 and 10, which assert error in refusal of Instructions A and E, supra.

8. Exceptions of counsel during make-up of charge (R. 149-150, at which the following took place):

> "The Court: . . . Now we are down to this matter of malice. I think in this kind of case we will have to use the long form . . .
>
> "Mr. Green: We object, of course, to any instructions along this line. We object to this because it is not our theory . . ."

9. Peremptory instruction to find for plaintiff on mere fact of publication, given at petitioner's request (R. 167, middle), but made applicable only if jury found publication charged violation of 2 U. S. C. 192, which petitioner claimed was true as a matter of law (R. 153, 154).

10. Brief of Appellant, Point I, p. 16, which alleges error in failure to give summary judgment and peremptorily instruct, without reference to malice.

Had the trial court found New York Times applicable to Pauling, he would have had no choice, under petitioner's theory and under his requests to charge, but to have dismissed his action, or to have directed a verdict against him. This is because New York Times predicates an affirmative showing of malice (in its special sense) and *petitioner refused from A to izzard to submit any such issue.*

This was a civil action, and petitioner was plaintiff. The Court was under no compulsion to try the petitioner's case for him, willy-nilly, as he might be, say, in the case of a criminal defendant.

Petitioner must stand or fall here on the only theory he presented below,—that he was entitled to recover *as a matter of law without showing malice.*

In the Matter of Linda Coal and Supply Company, 255 F. 2d 653, 656-657, 3rd Cir., C. C. A., it was said:

> "But a question, differing somewhat from the one just considered, persists. That is whether a party who has expressly relied on one theory is entitled to an adjudication at the trial level on any other theory which might afford relief on the same evidence. The general though not inflexible rule, dictated by the desirability of finality of judgments and seeing an end to litigation, is that a party is bound by and to the theory upon which he presents his case. . . . On the other hand, the reason for holding a litigant to his announced theory becomes more compelling as the litigation proceeds to advanced stages . . ."

Or, as this court held in Virginian Railway Co. v. Mullens, 271 U. S. 220, 227, 228, 46 S. Ct. 526, 529:

> "After bringing and trying the case on that theory the plaintiff cannot be permitted on this review to change to another which the defendant was not required to meet below."

The Court of Appeals having found that Pauling was subject to the requirement of New York Times that he prove malice in the sense of knowing falsehood, and he (although fully informed as to the existence and significance of the opinion) having refused to submit any such issue, the judgment for defendant must necessarily be affirmed.

* * * * * * *

As it was actually tried, the case below did not involve the law of *New York Times.* This is because that is the way petitioner wanted it. At petitioner's instance, the

case was tried on the pre-Times Missouri law, over respondent's objection.

The trial court acceded to petitioner's request to apply the Missouri law rather than the *Times* law.

Now, there developed differences of opinion of what the pre-Times Missouri law required, in the way of admissibility of evidence, instructions to the jury, *et cetera.*

The principal difference lay in petitioner's insistence that malice must be conclusively presumed from the pleadings and that under no hypothesis was *malice vel non* to be submitted to the trier of the fact issues, save only for consideration *in aggravation of punitive damages* (Instruction E, R. 156, etc.)

Whether the trial court ruled correctly in applying the pre-Times Missouri law in rulings on evidence or instructions is of no consequence in this court; for the premise of the second Question Presented is, *"If so"* (Pet. p. 2), *i. e.*, if the rule of New York Times applies.

If the rule of New York Times applies, then in considering questions of procedural errors hanging upon an asserted misinterpretation of pre-Times Missouri law (which by the hypothesis does not apply), the Court of Appeals would have been deciding a moot argument.

The fundamental gap in petitioner's claim here is his utter refusal below to recognize the rule of *New York Times,* requiring the submission of malice as a fact issue.

How, when petitioner himself refused to submit a finding on the issue of malice, can the trial court be found in error in the *manner* in which the issue was submitted? Or, more precisely, how can the Court of Appeals be convicted of error for a failure to rule on the question of whether an issue was properly tried, if the issue was never submitted by the complaining party? Petitioner did not want to have, and fought, bled and died against

having, any kind of jury trial at all on the question of malice as a requisite of liability, or, for that matter, on the question of liability, itself. What he wanted, and *all he asked for,* was a summary judgment or directed verdict: a judgment on liability as a matter of law and to restrict the jury trial to damages alone. If New York Times applies, he could not have the only thing he asked for, and the judgment for defendant, being the only judgment possible under the record he made, must stand.

Thus, this record does not present here the question (Pet. 2):

> ". . . whether petitioner has already proved . . . 'actual malice'."

c.

Malice Was Not Proved Anyway.

While, for reasons expressed under II b, supra, we deny that the question, of whether actual malice was proved, is presented by this record, it may be useful to the court to point out that malice, in the New York Times sense, was not proved anyway.

Under the New York Times rule "malice" means "actual malice", and even "actual malice" has a distinct and different meaning. The Court held (376 U. S. 279, 84 S. Ct. 726):

> "The constitutional guaranties require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made 'with actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."

The definition of malice in New York Times thus does not admit of the inclusion of *ill will* as a constitutive

element. Even so, this court nevertheless took occasion, in Garrison v. State of Louisiana, 379 U. S. 64, 73, 85 S. Ct. 209, 215, to repeat in explicit terms that malice under New York Times means only knowing or reckless falsehood, irrespective of ill will. The Court there held:

> "Moreover, even where the utterance is false, the great principles of the Constitution which secure freedom of expression in this area preclude attaching adverse consequences to any except the knowing or reckless falsehood. Debate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred; even if he did speak out of hatred, utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth . . ."

Thus while two of the three alleged "following facts," i. e., items (a) and (c) of the second Question Presented (Pet. 2-3), if proved, might have some bearing, respectively, upon the truth of the publication, or upon the publisher's hatred or ill will, they are of no value to the court in determining whether the plaintiff made out a case of malice under *New York Times.*

The sole and only evidence submitted by petitioner which could be said to be in any way relevant to the determination of whether petitioner sustained his burden of showing this publication to have been a deliberate falsehood or uttered with reckless disregard of the truth, is the bare unexplained out-of-context statement of the publisher at pages 14 and 15 of his deposition (R. 132): "We felt he was about to be cited; he wasn't" (R. 132, quoted in the Petition, p. 6, p. 14).

The petition does not explain, however, that this quotation was read in petitioner's *rebuttal,* nor that in his case *in chief* petitioner had read from the same deposition of the same witness the following (R. 46-47):

"Mr. Evans: Now I want to refer to pages 10 and 11 of the deposition:

"Q. I direct your attention to the second sentence in the sixth paragraph of the editorial entitled 'Glorification of Deceit', which is as follows: 'Pauling contemptuously refused to testify and was cited for contempt of Congress.' Do you find that in there?

"A. Yes. I see the sentence.

"Q. Was that true at the time that you wrote it?

"A. *I believed it to be true, but I found out later he had not been cited for contempt. I was in error at that time, and when Pauling wrote to me and called that to my attention, I published in full his letter to us calling attention to the correction, together with a letter of Senator Dodd which appeared in the Washington Post on the same subject . . . to which he referred in his letter, yes. I am sure you have the retraction of our statement of regret for the inadvertent error in your files.*"

What Amberg said at pages 14 and 15 of the deposition was intended to be merely a repetition of the earlier statement made at pages 10 and 11: "I believed it to be true, but found out later that he had not been cited." He stated: "I think I already told you that" (R. 132). ". . . this is the fourth time I mentioned it . . ." (R. 133).

That it was so understood by the plaintiff is clear from the fact that the first statement was what he offered in his case in chief, and the latter, on which he relies here, was offered only among other offers in rebuttal (R. 132, 133).

A plaintiff-appellant is bound on appeal by the theory he urged upon the court and jury below. Virginian Railway Co. v. Mullens, 271 U. S. 220, 48 S. Ct. 526, 70 L. Ed. 915, supra.

Petitioner's position and proof below was that respondent had made a mistake,—not that he published a deliberate

falsehood,—and that deliberateness was totally irrelevant to the question of liability; since liability, he claimed, existed as a matter of law. It was petitioner, not respondent, who read into evidence at the beginning of his case (R. 48), the statement of the author of the editorial: "I believed it to be true, but I found out later he had not been cited for contempt."

The attempted rebuttal (of what, it was not clear) offered was as follows:

> Mr. Evans (Reading) "Q. What information did you have with regard to the truth or falsity of this statement which we previously discussed at the time you wrote the editorial? Now, that's the statement that Pauling contemptuously refused to testify and was cited for contempt of Congress?"
>
> "A. I think I already told you that."
>
> "Q. You had no other information?"
>
> "A. I don't know what other information I had. I am trying to locate that. I am telling you this now: this is the fourth time I mentioned it, the sentence is technically in error."
>
> "Q. The sentence is what?"
>
> "A. Technically in error. He had not been cited for contempt of Congress. We felt he was about to be cited, he wasn't."

It is pretty evident, taking the whole of the petitioner's own evidence together, that Amberg's deposition does not rise to the requirement of knowledge of falsity or reckless disregard of truth called for by the rule of *New York Times*, and there is nothing else whatever in the record to rely on. *Washington Post Co. v. Keogh*, 365 F. 2d 965.

This also is what the Court of Appeals held, and there is no record basis for disturbing this finding.

As for petitioner's categorical statement "(a)" (Pet. 2), it is enough to say again that there is no such *crime* as

"contempt of Congress";* and as for the categorical statement (c) (Pet. 3), it suffices to say that the charges made were denied below and are still denied, and that the jury evidently did not believe them. The juxtaposition of Exhibits 8 and 5, the alteration of the size of Exhibit 8, and the deletion of the context of the cartoon (which shows conclusively that the "Commy" could not be Pauling, but represented those who telephoned about Pauling), Supp. Rec. p. 33, after the falseness of similar treatment in appellant's brief had been called to petitioner's attention in the Court of Appeals, seems to us *infra dignitatem.*

However this may be, neither (a) nor (c) are factors in assessing malice under the New York Times rule. Rosenblatt v. Baer, supra.

CONCLUSION.

It follows that neither for the settlement of the law nor for the vindication of a private right should the writ be granted on this petition.

Respectfully submitted,

LON HOCKER,
411 North Seventh Street,
St. Louis, Missouri 63101,
Attorney for Respondent.

GOLDMAN, EVANS & GOLDMAN,
EDWARD H. BLAU,
HOCKER, GOODWIN & MacGREEVY,
Of Counsel.

---

* No such words appear in 2 U. S. C. 192.

IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, 1966.

No. 522.

LINUS PAULING,
Petitioner,
vs.
GLOBE-DEMOCRAT PUBLISHING COMPANY,
Respondent.

PETITIONER'S REPLY BRIEF

In Support of Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

1. Respondent concedes that this case is squarely in conflict with **Associated Press v. Walker**, No. 150, 1966 Term, **cert. granted** October 10, 1966. It is submitted that this petition should also be granted, not only to give petitioner his opportunity to be heard, but also, by presenting a different factual context, to bring out other considerations to be balanced, and other ramifications to be considered, and to give this Court an opportunity to delineate the dimensions of "actual malice" more specifically than required in **Times** or **Walker.**

2. Respondent's brief in opposition (p. 11) obfuscates the issue when it argues that petitioner "cannot be permitted on this review to change to another" theory of liability, abandoning the theory petitioner urged at trial. Surely it is not *petitioner* who is changing theories; petitioner earnestly urges that the **Times** rule should not be extended to him, and that he is entitled to a proper trial

on the Missouri law of libel. It is the *court below* which has changed theories, to petitioner's regret.

The ruling below deprives petitioner of his day in court on either theory, by refusing to review the errors of the trial, and by refusing to grant a trial on the new theory. To quote Mr. Justice Brandeis, the ruling thus deprives petitioner of "due process of law—using that term in its primary sense of an opportunity to be heard", **Brinkerhoff-Faris Trust & Sav. Co. v. Hill**, 281 U. S. 673, 678 (1930), and of his right to jury trial, guaranteed by the Seventh Amendment.

Footnote 23 in **Times**, carefully read, does not go beyond public officials. The **Garrison** and **Rosenblatt** cases, relied on by the court below, not only fail to extend **Times** to this case, but were decided after the trial in this case. If the new rule advocated by the court below is to govern this case, it is fundamental that petitioner must "have a fair chance" to litigate his claim under that rule. **Schaff v. R. W. Claxton, Inc.**, 144 F. 2d 532, 533 (D. C. Cir. 1944). Even where the appellate interpretation of the law is not a startling innovation, if the case was tried on the wrong theory, the parties are entitled to an "opportunity to try the case . . . with this basic . . . interpretation . . . in mind." **Sutton Drilling Co. v. Universal Ins. Co.**, 335 F. 2d 820, 826 (5th Cir. 1964). The case "must therefore be remanded" for a trial on the new rule, if that rule is to be imposed on petitioner. **Knapp v. Imperial Oil & Gas Prod. Co.**, 130 F. 2d 1, 5 (4th Cir. 1942).

3. The brief in opposition (14-16) erroneously states that the "sole and only evidence . . . relevant" to the issue of malice, as defined by **Times**, is the admission of respondent's publisher that he knew, when he wrote the libelous editorial, that petitioner had not been cited for contempt. Respondent thus ignores not only the undis-

puted evidence that petitioner had not been cited for contempt, but also respondent's failure to suggest any possible excuse for printing the false charge, respondent's continuing campaign of other deliberately false and malicious editorial charges (made in spite of earlier publication of the truth in respondent's news columns), and the series of malicious and abusive epithets (Pet. 6-9, 14-15), all of which are relevant to show respondent's reckless disregard of the truth.

Respondent attempts to escape the impact of the publisher's devastating admission by stating that petitioner's "position and proof below was that respondent had made a mistake," not a deliberate lie, and petitioner should not now be permitted to change that position (15-16). As pointed out above, petitioner must now be given an opportunity to present his evidence in light of the new rule, if that rule is to be imposed upon him. Aside from that, respondent's assertion is simply not true; petitioner explicitly argued at the trial that respondent's publisher knew he was wrong when he wrote the libel, and "was taking a chance" (Tr. 320-21).

Respectfully submitted,

JOHN RAEBURN GREEN,

LEWIS C. GREEN,

THOMAS C. COLEMAN,
Attorneys for Petitioner.

GREEN, HENNINGS, HENRY & ARNOLD,
314 North Broadway,
St. Louis, Missouri 63102,
Of Counsel.

December 7, 1966.